WAN SAPIAH WAN DAUD

v.

PENGARAH JABATAN PERUBATAN DAN KESIHATAN KEMENTERIAN KESIHATAN MALAYSIA & ORS

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24(L)-482-1998]
1 FEBRUARY 2008

PUBLIC SERVANTS: *Dismissal - Dismissal of deceased store keeper of Health Department - Whether deceased's widow entitled to derivative pension - Procedure for institution of disciplinary action against deceased - Absence and untraceability of deceased - Whether dismissal null and void*

ADMINSTRATIVE LAW: *Public servants - Dismissal of deceased store keeper of Health Department - Whether deceased's widow entitled to derivative pension - Procedure for institution of disciplinary action against deceased - Absence and untraceability of deceased - Whether dismissal null and void*

PUBLIC SERVANTS: *Disciplinary proceedings - Procedure - Gazette notification - Whether complied with - Absence and untraceability of deceased - Whether breach of procedure could be treated as de minimis - Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, GO 21, GO 26*

ADMINISTRATIVE LAW: *Public servants - Public servant, disciplinary proceedings against - Procedure - Gazette notification - Whether complied with - Absence and untraceability of deceased - Whether breach of procedure could be treated as de minimis - Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, GO 21, GO 26*

This began as an application for declarations to the effect that the dismissal of the plaintiff's late husband ('deceased') from the civil service was wrong, and/or null and void, and that the deceased was entitled to all benefits as a civil servant. However, in the course of arguments, the plaintiff withdrew all claims by the estate of the deceased, with her only claim being that as widow of the deceased for a derivative pension. The deceased, a store keeper at the Health Department in Ipoh, was deemed, by Gazette notification, to have been dismissed for the misconduct of being

absent without leave. The issue to be considered was whether there was compliance with the procedure pertaining to the institution of disciplinary action against the deceased. The plaintiff submitted that two procedures were adopted, they being GO 21 and GO 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. It was averred that having proceeded under GO 26, the defendants could not later switch to GO 21. The plaintiff also contended that, in any event, GO 21 and/or GO 26 had not been complied with.

Held (allowing the application):

(1) The plaintiff's submission that the defendants had adopted the procedures under both GO 21 and GO 26 was, on the facts, not entirely unjustified. Notwithstanding that, the progression of the instant case showed that the defendants, by a process of trial and error, had reached the last procedural hurdle. All conditions had been satisfied for the Disciplinary Authority to take steps to notify in the Gazette the fact of the deceased's absence and untraceability. However, it still turned out that the notification in the Gazette was short on full and complete compliance. The fact of the absence of the deceased was notified in that Gazette but the fact of the untraceability of the deceased was not. That was a failure in procedure, which could not be treated as *de minimis* in favour of the defendants as it was a breach of a provision which concerned the livelihood of the deceased and the right of the plaintiff to a derivative pension. Given that the breach could not be treated as *de minimis*, this application could not be dismissed. The only course open was to grant this application and declare the dismissal of the deceased as invalid. *Aw Ngoh Leang v. Inspector General of Police & Ors* (foll); *Mohd Noor Abdullah v. Nordin Haji Zakaria & Anor* (foll). (paras 15, 16, 17 & 18)

Case(s) referred to:

Aw Ngoh Leang v. Inspector General of Police & Ors [1993] 1 CLJ 373 SC ***(foll)***

Hjh Halimatussaadiah Hj Kamaruddin v. Public Services Commission, Malaysia & Anor [1994] 3 CLJ 532 SC ***(refd)***

Ketua Pengarah Jabatan Hasil Dalam Negeri & Anor v. Aria Kumar & Anor [1995] 3 CLJ 507 CA ***(refd)***

Mohd Noor Abdullah v. Nordin Hj Zakaria & Anor [2001] 2 CLJ 564 CA ***(foll)***

Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***
Sungai Wangi Estate v. UNI [1975] 1 LNS 172 HC ***(refd)***

Legislation referred to:
Public Officers (Conduct and Discipline) (Chapter D), General Orders 1980, GO 21(1), (3), (4), (5), (6), 26(2), (5), (6)

For the plaintiff - Manjit Kaur Nijar; M/s Nijar & Nijar
For the defendants - Mohamed Naser Desa; Attorney-General's Chambers

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:

[1] This began as an application for declarations to the effect that the dismissal of the plaintiff's late husband from the civil service was wrong, and/or null and void, and that the plaintiff's late husband (hereinafter referred to as the deceased) was entitled to all benefits as a civil servant. But in the course of arguments, Miss Manjit Kaur Nijar for the plaintiff withdrew all claims by the estate of the deceased, and said that the only claim of the plaintiff was as widow for the deceased for a derivative pension.

[2] In relation to the background facts, the following were agreed (see encl. 34). The deceased joined the civil service on 1 March 1953 (confirmed on 1 March 1956) and was a store keeper at the Health Department in Ipoh. By letter dated 12 November 1983 (exh. MHA2), Abdul Mohsin bin Mohamed, Penguasa Kanan Ahli Kimia Ubat, Jabatan Perubatan dan Kesihatan, Perak, who was the Chairman of the disciplinary board for the Clerical and Technical Group notified the deceased that he (deceased) was absent without leave and that he (deceased) was to report for duty at once. By letter dated 16 November 1983 (MHA3), Abdul Mohsin bin Mohamed, again notified the deceased that he (deceased) was absent without leave and that he (deceased) was to report for duty at once. That letter dated 16 November 1983 (MHA3) was received by the deceased. The "show cause" letter dated 31 December 1983 (E3) from the Chairman of the disciplinary board was also received by the deceased. E3 dated 31 December 1983 gave the deceased 14 days to answer to the

misconduct, namely absence from duty without leave from 7 November 1983 to 31 December 1983. On 25 June 1984, a report of a *prima facie* case for disciplinary action (MHA5) was signed by Abdul Mohsin bin Mohamed. On 12 July 1984, the disciplinary board for the Clerical and Technical Group convened an inquiry; Abdul Mohsin bin Mohamed, who attended as member of the disciplinary board, recorded and confirmed the minutes of the proceedings (MHA6). According to the minutes of that inquiry, the disciplinary board recommended the dismissal of the deceased without salary for the period of absence. Then by letter dated 7 December 1984 (MHA7), Abdul Mohsin bin Mohamed again notified the deceased that he (deceased) was absent without leave and that he (deceased) was to report for duty at once. On 1 August 1985 (exh. MHA1), it was gazetted that the deceased was deemed dismissed with effect from 7 November 1983. After the death of the deceased on 5 February 1991 at age 59, the plaintiff applied to the defendants for a widow's pension, but she was turned down on the ground that the deceased had been dismissed.

[3] Miss Manjit Kaur submitted as follows. By gazette notification dated 1 August 1985, the deceased was deemed to have been dismissed on 7 November 1983. The deceased was absent from duty from 7 November 1983. The governing General Order (GO) was the 2nd limb of GO 21(4) which provided that the Head of Department shall report the absence to the Disciplinary Authority (DA) who may then institute disciplinary action against the deceased in accordance with GO 26 with a view to dismissal or reduction in rank. The procedure was GO 26. The defendants proceeded under GO 21(5), where it was the procedure to send an AR Registered letter. It was agreed that there was an AR registered letter dated 12 November 1983, but it was not agreed that it was received. The AR registered letter dated 16 November 1983 was received by the deceased. According to the contents of the report dated 25 June 1984 (MHA5), there was a telegram dated 22 November 1983 which stated that the deceased was not well. Under GO 26(2), the DA shall call upon the officer to state in writing within a period of not less than 14 days a representation containing grounds upon which he relies to exculpate himself. But the show cause letter dated 31 December 1983 (E3) required the deceased to reply within 14 days. The recommendation of the disciplinary board dated 12 July

1984 (MHA6) was not followed by the DA who dismissed the deceased. The show cause letter dated 31 December 1983 (E3) was issued under GO 21(5), while the disciplinary inquiry of 12 July 1984 (MHA6) was conducted under GO 21(4). The recommendation of the head of department must be followed in the form of punishment. One other failure in procedure was that Abdul Mohsin bin Mohamed also sat on the disciplinary board. A complainant should not sit on the disciplinary board (counsel cited *Rohana Ariffin & Anor v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390). The deceased was called to report for duty in spite of the disciplinary board's recommendation of dismissal. There was a decision to retain the deceased (counsel cited *Sungai Wangi Estate v. UNI* [1975] 1 LNS 172). An AR registered letter could not be sent without there being prior steps to trace the deceased (counsel cited *Ketua Pengarah Jabatan Hasil Dalam Negeri & Anor v. Aria Kumar & Anor* [1995] 3 CLJ 507). Two procedures were adopted. It was both GO 26 and GO 21. Having proceeded under GO 26, the defendants could not later switch to GO 21. GO 21 and GO 26 are mutually exclusive. In any event, GO 21 and or GO 26 had not been complied with.

[4] Mr. Mohd Nasir for the defendants submitted as follows. GO 21 was the procedure adopted. The report (MHA5) was the first step in the disciplinary proceeding. The show cause letter dated 31 December 1983 (E3) was not served and all disciplinary action based on E3 was not further pursued. The actual commencement of the disciplinary proceeding was the report in MHA5 that was made under GO 21(4). Pursuant to the report in MHA5, the disciplinary board sat on 12 July 1984 (MHA6). The members of the disciplinary board were officers at department level. Under GO 21(4), the DA must take action in accordance with GO 26 with a view to dismissal or reduction in rank. Hence, the recommendation of the disciplinary board was dismissal. The procedure under GO 21(4) was abandoned. It was GO 21(5) that was ultimately adopted. It was an agreed fact that MHA7 was not delivered. The gazette (exh. MHA1) complied with both GO 21(5) and 21(6).

[5] Miss Manjit replied that her basic objection was that the show cause letter gave 14 days to the deceased to reply whereas it should be more than 14 days. The show cause letter was issued under GO 21(5), but GO 21 and or GO 26 was not complied. Mr. Mohd Nasir answered that the disciplinary proceeding was

not based on the show cause letter dated 31 December 1983 (E3). The defendants proceeded under GO 21(5) and GO 21(6). GO 26 did not apply. MHA2, MHA3, MHA4 and E3, which were attempts to contact the deceased, showed that the deceased could not be traced. MHA7 was the notice issued under GO 21(5) while MHA8 was the proof that MHA7 was undelivered. MHA7 was received by the Kementerian Kesihatan Malaysia.

[6] Both counsel had their say. Now, what has the law got to say in relation to the facts? GO 21(1) provides that "absence without leave or prior permission or without reasonable cause shall render an officer liable to disciplinary action". It is beyond dispute that the deceased was absent for a period exceeding seven working days consecutively. For that period of absence, GO 21(4) provides:

> Where an officer is absent for a period exceeding seven working days in any calendar month, or exceeding seven working days consecutively, that fact shall forthwith be reported by the Head of Department to the Appropriate Disciplinary Authority together with the dates and circumstances of the absence and any further information which may be required concerning the officer. Upon consideration of the said report, the Disciplinary Authority may then institute disciplinary action against the officer in accordance with General Order 26 with a view to dismissal or reduction in rank. Pending the decision of the Disciplinary Authority, the officer shall not be entitled to any salary or remuneration for the period of his absence.

[7] In short, GO 21(4) provides that the Head of Department shall report the fact of absence to the DA who may, not shall, institute action in accordance with GO 26.

[8] Providing for the situation where an officer is absent and cannot be traced, GO 21(5) says:

> Where an officer is absent and cannot be traced, the Head of Department shall cause to be sent to the officer's last known address an AR (Acknowledged of Receipt) registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once. If within seven days after receipt of the letter the officer report for duty, the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of the General Order. If seven days after the receipt of the letter by the officer, he is still absent or nothing is heard of or from him, the Head of

> Department shall proceed to submit a report to the Appropriate Disciplinary Authority as required under paragraph (4). Upon consideration of the said report the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this General Order; but in case where the said letter is returned undelivered, the Disciplinary Authority shall take steps to notify in the Gazette the fact of the officer's absence and his untraceability.

[9] Hence, where an officer is absent and cannot be traced, the Head of Department shall cause to be sent to the officer's last known address an AR registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once (see *Ketua Pengarah Jabatan Hasil Dalam Negeri & Anor v. Aria Kumar & Anor* [1995] 3 CLJ 507, where it was held by the Court of Appeal that "the AR registered letter ... can only be sent, where an officer is absent and cannot be traced"). If within seven days after receipt of the letter the officer reports for duty, the DA shall, not may, institute disciplinary action either under paras. (3) or (4) of GO 21. In other words, where the officer reports for duty within seven days, the DA shall institute disciplinary action under paras. (3) or (4) of GO 21. If seven days after the receipt of the letter by the officer, he is still absent or nothing is heard of or from him, the Head of Department shall proceed to submit a GO 21(4) report to the DA who upon consideration of the report shall, not may, institute disciplinary action under paras. (3) or (4) of GO 21. In other words, if the officer is still absent or not heard of or from him after seven days, the Head of Department shall proceed to submit a GO 21(4) report to the DA who upon consideration of the report shall, not may, institute disciplinary action either under paras. (3) or (4) of GO 21. But where that letter is returned undelivered, the DA shall take steps to notify in the Gazette the fact of the officer's absence and his untraceability.

[10] As for the legal effect of the notification in the Gazette of the fact of the officer's absence and untraceability, GO 21(6) provides:

> If despite notification in the Gazette, the officer fails to return for duty within a period of seven days from the date of the publication of the Gazette, the officer shall be deemed to have been dismissed from the service with effect from the date of his absence. If within seven days after the publication of the Gazette

A the officer reports for duty, the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this General Order.

[11] Accordingly, where an officer fails to return for duty within seven days from the date of publication of the Gazette, then he shall be deemed to have been dismissed from service with effect from the date of absence. If the officer reports for duty within the stipulated seven days, then the DA shall institute disciplinary action under paras. (3) or (4) of GO 21.

[12] It pans out, that the Head of Department shall submit a O. 21(4) report to the DA (i) where an officer is absent for a period of seven working days in any calendar month or exceeding seven working days consecutively (see 1st limb of GO 21(4)), or (ii) where an officer who has received a GO 21(5) AR registered letter and seven days have passed, is still absent or not heard of or from him. It also pans out that under GO 21(4), the Head of Department is not required to send to the officer's last known address an AR registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once. Under GO 21(4), the procedure is that the fact of absence shall forthwith be reported by the Head of Department to the DA together with the dates and circumstances of the absence and any further information which may be required concerning the officer, and upon consideration of the said report, the DA may institute disciplinary action against the officer in accordance with GO 26. By contrast, the DA shall institute disciplinary action under paras. (3) or (4) of GO 21 in the following situations: (i) against an officer who has reported for duty within seven days of receipt of the AR registered letter, or (ii) against an officer who has received AR registered letter but is still absent or not heard of and seven days have passed since receipt of the AR registered letter.

[13] An AR registered letter under GO 21(5) is the procedure where an officer is absent and also cannot be traced. If seven days after receipt of that letter by the officer, he is still absent or not heard of, then the Head of Department shall submit the GO 21(4) report.

[14] However, where the registered letter is returned undelivered, then the DA shall take steps to notify in the Gazette the fact of the officer's absence. If despite notification in the Gazette, the officer fails to return for duty within a period of seven days from the date of publication of the Gazette, then the officer shall be deemed dismissed from service with effect from the date of his absence.

[15] It was submitted that the defendants adopted the procedure under both GO 26 and GO 21. And that submission was not entirely unjustified. First, the defendants proceeded under GO 21(5), as the AR registered letter was a procedure only under GO 21(5). Had the defendants proceeded under GO 21(4), then the GO 21(4) report would have been the first thing done by the Head of Department and not the second as in the instant case. Now having proceeded under GO 21(5), the next step should have been, if the AR registered letter were delivered, the submission of the GO 21(4) report by the Head of department to the DA who shall institute disciplinary action, or, if the AR registered letter were undelivered, the notification in the Gazette by the DA of the fact of the officer's absence and untraceability. At that stage, only the DA could take it one step further, that is, to institute disciplinary action with a view to dismissal or reduction in rank or take steps to notify in the Gazette. But that was not the case, for the next two actions were taken by Chairman of the disciplinary board who issued a show cause letter (E3) to the deceased and also submitted a report (MHA5) of a *prima facie* case with a recommendation of dismissal, and by the disciplinary board who directed, on 12 July 1984 (MHA6), the dismissal of the deceased, which action could not have been taken by the Chairman or by the disciplinary board. Under GO 26(2), it was for the DA to find "that there is a *prima facie* case for dismissal or reduction in rank, to issue the letter in writing of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank, and to call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself" (see *Hjh Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Anor* [1994] 3 CLJ 532, where it was held by the former Supreme Court that the procedure adopted – the disciplinary board deciding that proceedings for dismissal should be instituted and the PSC writing the show cause letter – was in compliance with GO 24 and 26 of

A the 1980 General Orders, and that the chairman of the disciplinary board had no power of dismissal). GO 26(5) empowers the DA to appoint a Committee of Inquiry. But that Committee of Inquiry could do no more than submit a report to the DA. Only the DA could decide on the dismissal of the deceased. The defendants had
B not got it right, procedure wise.

[16] However, it was explained that all disciplinary proceedings based on letters dated 12 November 1983 (MHA2) or 16 November 1983 (MHA3) were halfway abandoned. And so it
C would seem, for the next act by the defendants, the issuance on 7 December 1984 of a fresh AR registered letter (MHA7) by the Head of Department to the deceased was the first step in the procedure under GO 21(5). Crucially, that AR registered letter dated 7 December 1984 was returned undelivered (see MHA7).
D The letter of the postal authority (MHA8) was confirmation that the deceased could not be traced. By a process of trial and error, the defendants had reached the last procedural hurdle. All conditions had been satisfied for the DA to take steps to notify in the Gazette the fact of the deceased's absence and
E untraceability. In the event, those steps were taken by the Public Services Commission who instructed (see SS1 dated 9 July 1985) the Ministry of Health to notify in the Gazette the fact of the deceased's absence and untraceability. To its credit, the Public Services Commission even took particular care to provide a copy
F of the required notification in the Gazette to ensure due observance of the last limb of GO 21(5). Yet somehow it still turned out that the notification in the Gazette was short on full and complete compliance.

G **[17]** The pertinent Government Gazette Notification No. 3968 dated 1 August 1985, read as follows:

> Jawatan-jawatan yang tesebut di bawah ini telah dikosongkan oleh penyandang-penyandangnya kerana meninggalkan jawatan-jawatan tanpa cuti atau lain-lain sebab yang munasabah. Adalah
H dimaklumkan sekiranya mereka masih juga tidak bertugas dalam tempoh tujuh (7) hari dari tarikh Penyiaran Warta ini, mereka hendaklah dianggap sebagai telah dibuang kerja mulai tarikh meninggalkan jawatan:

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Nama Penyandangnya	Jawatan dan Tempat Kerjanya	Tarikh Meninggalkan Jawatan dan lain-lain hal
Mohd Basri bin Hussein	Penyelenggara Stor, Tingkatan Kanan, Stor Perubatan Pusat, Negeri Perak, Ipoh, Perak	7hb. November 1983 (SPA.27418/3.)

[18] The fact of the absence of the deceased was notified in that Gazette but the fact of the untraceability of the deceased was not. That was a failure in procedure, which could not be treated as *de minimis* in favour of the defendants, as it was a breach of a provision which concerned the livelihood of the deceased and the right of the plaintiff to a derivative pension (for an analogy, see *Aw Ngoh Leang v. Inspector General of Police & Ors* [1993] 1 CLJ 373, where it was held by the former Supreme Court that the maxim *de minimis non curat lex* (the law does not concern itself with trifles) can have no application in a case where the breach of a mandatory requirement involves the civil liberty of an individual). Given that the breach could not be treated as *de minimis*, this application could not be dismissed. The only course open is to grant this application and declared the dismissal of the deceased as invalid, which is now accordingly ordered (see *Mohd Noor bin Abdullah v. Nordin bin Haji Zakaria & Anor* [2001] 2 CLJ 564, where it was held by the Court of Appeal that non-compliance of the mandatory requirements of General Orders 1993 will result in a dismissal being declared invalid).